United States Court of Appeals

for the Second Circuit



APPELLANT'S BRIEF & APPENDIX

75-1246

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P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

DONALD EUCKER,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR DEFENDANT-APPELLANT

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UNITED STATES COURT OF APPEALS
FILED
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A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-1246

UNITED STATES OF AMERICA,

Appellee,

-against-

DONALD EUCKER,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

QUESTIONS PRESENTED

1. Is a plea of guilty to an indictment charging the illegal hypothecation by a broker-dealer of customers' securities in violation of Section 8(c) of the Securities Exchange Act of 1934 (15 U.S.C. §78h[c]) and the regulation promulgated thereunder (17 C.F.R. §240.8c-1) fatally defective because the indictment alleges and the plea admitted only that customers' fully paid for securities were hypothecated and not that the total amount of customers' securities hypothecated was "for a sum which exceed[ed] the aggregate indebtedness of all customers in respect of securities carried for their accounts?"

2. Is it an essential element of the crime of illegal hypothecation in violation of 15 U.S.C. §78h(c) that the total

amount of customers securities hypothecated be "for a sum which exceeds the aggregate indebtedness of all customers in respect of securities carried for their accounts?"

STATEMENT PURSUANT TO RULE 28(3), FEDERAL RULES OF APPELLATE PROCEDURE

This is an appeal from a judgment of the United States District Court for the Southern District of New York (Knapp, J.) rendered on June 16, 1975, convicting appellant, Donald Eucker, based on his plea of guilty, of unlawfully hypothecating customers' securities in violation of Title 15, United States Code, Section 78h and the regulation promulgated thereunder (17 C.F.R. §240.8c-1).

Eucker and four others were charged (Indictment 74 Cr. 859) with conspiracy (18 U.S.C. §371) (Count 1); falsely making and maintaining books and records (15 U.S.C. §78q[a], 17 C.F.R. §240.17a-3) (Counts 2 through 7); making false and misleading statements in a financial report (15 U.S.C. §78q [a], 17 C.F.R. §240.17a-5) (Count 8); and hypothecating customers' securities (15 U.S.C. §78h, 17 C.F.R. §240.8c-1) (see Indictment, A 2-19).*

Eucker moved in the trial court for a dismissal of Counts 2 through 7 upon the ground that prosecution of the crimes charged in those counts was barred by the statute of limitations and for a dismissal of Count 9 and a portion of Count 1

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*References in parantheses preceded by "A" are to pages of Eucker's Appendix annexed to this brief.

upon the ground that the counts were defective as failing to allege an essential element of the crime charged.

Eucker's motion to dismiss Counts 2 through 7 was granted (United States v. Sloan, 389 F. Supp. 526 [S.D.N.Y. 1975]), but the motion addressed to Count 9 and a portion of Count 1 was denied (see transcript of plea, p. 2, A 28).

On March 14, 1975, Eucker entered a plea of guilty on Count 9, and on June 16, 1975, he was sentenced to a term of imprisonment of one year and one day (transcript of sentencing, p. 123, A 55). Counts 1 and 8 (the remaining counts) were dismissed (transcript of sentencing, pp. 123, A 55).

A Notice of Appeal from the judgment of conviction was timely served and filed on June 25, 1975.

Execution of Eucker's sentence has been stayed pending appeal (transcript of sentencing, p. 123, A 55).

STATEMENT

Donald Eucker, a 43-year old man with a wife and four children, has a previously unblemished record. In 1968, Eucker became a partner of Orvis Brothers & Co., a New York stock and securities brokerage firm and member of the New York and American Stock Exchange.

The financial collapse of Orvis in 1970 resulted in Stock Exchange and SEC disciplinary hearings, civil litigations,

and this criminal prosecution.

It is clear that during the months prior to Orvis' suspension by the New York and American Stock Exchange on June 3, 1970, Orvis' management engaged in certain transactions in an all-out effort to save the firm from bankruptcy. Among those efforts was the continuation of a common Wall Street practice of pledging (i.e., "hypothecating") customers' securities to secure loans made to the firm. In some instances the securities hypothecated were fully paid for by the customers.* Again, Eucker did not innovate Orvis' practice of pledging fully paid for securities. This practice had been in existence for many years, and Eucker inherited a situation which circumstances did not permit him to change by the time of Orvis' failure (transcript of sentencing, pp. 99-102, A 44-47).

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*Available data demonstrates that the practice of pledging fully paid for securities is common:

CUSTOMERS' FULLY PAID FOR SECURITIES
PLEDGED BY BROKERS AND BANKS

Firm	Customers' Fully Paid Securities Pledged
Merrill Lynch	$ 3,482,986
Bache	24,896,949
duPont, Glore Forgan	19,850,736
Goodbody	18,957,886
Hornblower	10,298,936
Paine, Webber	1,909,741
Walston	5,049,415
E. F. Hutton	2,519,269
Hayden, Stone	173,668
Dean Witter	303,431
Total	$87,443,017

See, Barach, H., WALL STREET - SECURITY RISK, p. 36, Acropolis Books Ltd., Wash., D.C. (1971).

Count 9 of the indictment charged that from August 1, 1969 to June 3, 1970, Eucker and the other defendants violated 15 U.S.C. §78h (Section 8 of the Securities Exchange Act of 1934) and the regulation promulgated thereunder (17 C.F.R. §240.8c-1) by hypothecating customers' fully paid for securities (A 17, 18).

Count 9 reads, inter alia, as follows:

> "From on or about the 1st day of August, 1969 up to and including the 3rd day of June 1970, in the Southern District of New York, FERGUS M. SLOAN, JR., CARL W. ANDERSON, DONALD EUCKER, JOHN J. VILLANI, and THOMAS C. KILDUFF, the defendants, unlawfully, wilfully and knowingly, did, directly and indirectly, hypothecate and arrange for and permit the continued hypothecation of fully paid for securities carried for the account of customers of Orvis under circumstances that permitted such securities to be hypothecated and subjected to liens and claims of pledges in amounts up to $7,000,000.00"

Eucker moved to dismiss Count 9 upon the ground that the count failed to allege an essential element of the crime charged, to wit, that the total amount of securities hypothecated was in excess of the aggregate indebtedness to Orvis of all customers on all of their securities carried for their account by Orvis. The motion to dismiss Count 9 was denied (transcript of plea, p. 2, A 28).

Eucker pleaded guilty to Count 9, acknowledging that he caused or permitted fully paid for securities to be hypothecated and that he did so knowingly (transcript of plea, pp. 11, 14, A 32, 35). He expressly denied, however, "that he either

had knowledge or, for that matter, that the fact existed that * * * the total hypothecation of securities by Orvis exceeded the aggregate net indebtedness of all Orvis customers" (transcript of plea, pp. 11-12, A 32-33).

Eucker's guilty plea to Count 9 was accepted by the court on the explicit understanding that there would be an appeal from the denial of Eucker's motion to dismiss Count 9 as failing to allege an essential element of the crime charged (see, transcript of plea, p. 2, A 28; transcript of sentencing, pp. 100, 114, A 45, 50).*

Such a procedure has been approved by this Court (United States v. Burke, ____ F. 2d ____ [2d Cir. 1975], slip op. 3571, 3573; United States v. Lopez, ____ F. 2d ____ [2d Cir. 1975], slip op. 4427, 4429). Moreover, it is well settled that the failure of an indictment to charge an offense is a "jurisdictional" defect and thus not embraced within the rule that a guilty plea waives all nonjurisdictional defects.

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*At sentencing the government offered Eucker an opportunity to withdraw his plea of guilty to Count 9 in lieu of an appeal. The court responded as follows (transcript of sentencing, p. 114, A 50):

> "No, unless he has not applied to withdraw it, it is perfectly clear that at the time the plea was taken the appeal was intended and he told us the day before he pleaded that he wanted to appeal * * *."

United States v. Doyle, 348 F. 2d 715, 718 (2d Cir. 1965), cert. denied, 382 U.S. 843 (1965); Coleman v. Burnett, 477 F. 2d 1187, 1194n.20 (D.C. Cir. 1973); Kolaski v. United States, 362 F. 2d 847, 848 (5th Cir. 1966); Hopkins v. United States, 344 F. 2d 229, 234 (8th Cir. 1965); Marteney v. United States, 216 F. 2d 760, 762 (10th Cir. 1954), cert. denied, 348 U.S. 953 (1955); United States v. Zullo, 151 F. 2d 560, 561 (3d Cir. 1945).

ARGUMENT

POINT I

APPELLANT'S PLEA TO COUNT 9 OF THE INDICTMENT IS FATALLY DEFECTIVE IN THAT THE INDICTMENT FAILS TO ALLEGE AND THE APPELLANT DENIED AN ESSENTIAL ELEMENT OF THE CRIME CHARGED, TO WIT, THAT THE TOTAL AMOUNT OF SECURITIES HYPOTHECATED WAS IN EXCESS OF THE AGGREGATE INDEBTEDNESS OF ALL CUSTOMERS ON ALL OF THEIR SECURITIES

Count 9, to which appellant pleaded guilty, alleges a violation of Section 8 of the Securities Exchange Act of 1934 (the "1934 Act")(15 U.S.C. §78h) and the regulation promulgated thereunder (17 C.F.R. §240.8c-1) which forbid the hypothecation by member firms of customers' securities in certain circumstances.

We submit that the count in alleging only that customers' fully paid for securities were hypothecated fails to allege an essential element of the crime charged, to wit, that the total amount of securities hypothecated were for a sum exceeding "the aggregate indebtedness of all customers in respect of securities carried for their accounts."

Accordingly, Count 9 of the indictment as well as appellant's guilty plea to that count in which he denied that the amount hypothecated exceeded the aggregate indebtedness of all customers are defective requiring a reversal of the conviction and a dismissal of Count 9.*

*The trial court denied Eucker's motion to dismiss

Section 8(c) of the 1934 Act (15 U.S.C. §78h) makes it unlawful, inter alia, for any broker or dealer:

> "In contravention of such rules and regulations as the Commission shall prescribe for the protection of investors to hypothecate or arrange for the hypothecation of any securities carried for the account of any customer under circumstances * * * that

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fn contd.,

Count 9 relying in part on United States v. Schwartz, 464 F. 2d 499 (2d Cir. 1972), cert. denied, 409 U.S. 1009 (1972), and analogizing the hypothecation of fully paid for securities with common law larceny (see transcript of plea, p. 2, A 28; transcript of sentencing, p. 99, A 44).

It is submitted that reliance on United States v. Schwartz, supra, is misplaced. The issues in that case concerned the defendant's right to a speedy trial, the meaning of the phrase "securities carried for the account of any customer," and whether the defendant was a broker or dealer covered by the statute. This Court did not hold that hypothecation of fully paid for securities was within the reach of 15 U.S.C. §78h. Indeed, the indictment in Schwartz evidently charged as an element of the crime the very allegation missing here, that the amount hypothecated exceeded all customers' indebtedness. See, United States v. Saporta, 270 F. Supp. 183, 185 (E.D.N.Y. 1967).

The analogy to common law larceny is also misplaced. Crucial to the concept of common law larceny is an intent to permanently deprive an owner of his property. See, People ex rel. Perkins v. Moss, 187 N.Y. 410, 419-20, 80 N.E. 83 (1907); Irving Trust Co. v. Leff, 253 N.Y. 359, 171 N.E. 569 (1930). The pledging of customers' securities to secure a loan is not a permanent deprivation nor is there an intent to permanently deprive the owner of his securities. Indeed, the agreement between the customer and broker typically grants the customer's consent to the broker to pledge the customer's securities for an amount greater than the customer's indebtedness to the broker.

> will permit such securities to be hypothecated, or subjected to any lien or claim of the pledgee, for a sum in excess of the aggregate indebtedness of such customers in respect of such securities." (Emphasis supplied.)

Pursuant to the authority delegated by the statute, the SEC promulgated Rule 8c-1 (17 C.F.R. §240.8c-1) which defines the conduct made unlawful by the statute. The pertinent provisions of Rule 8c-1 are as follows:

> "* * * no broker or dealer * * * shall * * * hypothecate or arrange for or permit the continued hypothecation of any securities carried for the account of any customer under circumstances--(3) that will permit securities carried for the account of customers to be hypothecated, or subjected to any lien or claim or claims of the pledgee or pledgees, for a sum which exceeds the aggregate indebtedness of all customers in respect of securities carried for their accounts * * *." (Emphasis supplied.)

It is plain that the statute (15 U.S.C. §78h) by itself prohibits no specific conduct or act, but makes unlawful only the "contravention of such rules and regulations as the Commission shall prescribe."

Thus, although Section 8(c) of the 1934 Act arguably would permit the enactment of an SEC rule proscribing the hypothecation of a particular customer's securities for a sum greater than the aggregate indebtedness of that customer on those securities, the existing SEC rule--which defines the only

conduct made unlawful by Section 8(c) of the Act--does not do so. The SEC rule only limits the total amount which can be borrowed on customers' securities in relation to the total indebtedness of all customers of a member firm on all of their securities.

It is only when the hypothecation is "for a sum which exceeds the aggregate indebtedness of all customers in respect of securities carried for their accounts" that there is a contravention of the rule prescribed by the Commission and a violation of the statute (15 U.S.C. §78h).*

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*In response to Eucker's request for particulars as to "the aggregate indebtedness of all of Orvis Brothers & Co. customers in respect of securities carried for their accounts at the time of the alleged hypothecation," the government stated that the request was "irrelevant and immaterial" (see Government's Bill of Particulars, p. 24).

Indeed, the evidence adduced by the prosecution at the trial of Eucker's co-defendants establishes that the total of the liens of pledgees on customers' securities did not exceed the aggregate indebtedness of all of the customers in respect of securities carried for their accounts. Government Exhibit 74 (the August 31, 1969 Orvis Brothers & Co. Financial Questionnaire) demonstrates that the total amount of Orvis' borrowings ($18,521,300.00) was less than the aggregate indebtedness of all of its customers on securities carried for their accounts ($21,398,719.14).

In such circumstances, we submit, the suggestion that the statute and regulation embody common law concepts of larceny and that appellant's conduct in violation of their proscription was, in effect, a larceny is even more inappropriate. Since the overall indebtedness of Orvis customers exceeded the amount of the hypothecation, at any time that an Orvis customer demanded his securities, Orvis was entirely capable of complying with that demand by a process of substitution, i.e., substituting other securities in the place of the securities to be delivered to the customer. Accordingly, the circumstances demonstrate that there was not and could not have been an intent to permanently deprive as is fundamental to ordinary notions of larceny.

It is fundamental that where an act of Congress prohibits a generic class of conduct but explicitly delegates to an administrative agency the power to precisely define the scope of the prohibition by rule or regulation, the conduct which is prohibited and thus punishable under the statute (if made criminal by the statute) is that defined by the rule or regulation. See, United States v. Mersky, 361 U.S. 431, 437-438 (1960); M. Kraus & Bros., Inc. v. United States, 327 U.S. 614, 622 (1945); United States v. Pincourt, 167 F. 2d 831, 833 (3d Cir. 1948); United States v. Morgan, 118 F. Supp. 621, 696 (S.D.N.Y. 1953); Securities and Exchange Commission v. Otis & Co., 18 F. Supp. 100, 103 (N.D. Ohio 1936), aff'd, 106 F. 2d 579 (6th Cir. 1939); United States v. Hark, 49 F. Supp. 95, 97 (D. Mass. 1943), rev'd on other grounds, 320 U.S. 531 (1944); and compare United States v. Pennsylvania Industrial Chemical Corp., 411 U.S. 655 (1973).

In Kraus, supra, the Supreme Court reversed the conviction of a defendant who was charged with violating the Emergency Price Control Act of 1942 (50 U.S.C. Appx. §§901 et seq.) and the regulations promulgated by the Price Administration thereunder. In determining the scope of the statute which punished a "violation of any regulation" promulgated by the Administrator, Mr. Justice Murphy wrote as follows (id., 327 U.S., at 622);

> "The prohibited conduct must, for criminal purposes, be set forth with clarity in the regulations and orders which he [i.e., the Administrator] is authorized

by Congress to promulgate under the Act. Congress has warned the public to look to that source alone to discover what conduct is likely to create criminal liability." (Emphasis supplied.)

Similarly, the statute charged to have been violated in the instant case, Section 8(c) of the 1934 Securities Exchange Act, prohibits hypothecation by any broker or dealer "in contravention of such rules and regulations as the Commission shall prescribe," and consequently "warn[s] the public to look to that source alone [i.e., "such rules and regulations as the Commission shall prescribe"] to discover what conduct is likely to create criminal liability." And the only regulation which can be "contravened"--Rule 8c-1 (17 C.F.R. §240. 8c-1)--prohibits hypothecation of securities in an amount exceeding the total indebtedness of all customers on their securities, not the mere hypothecation of fully paid for securities of particular customers.

The SEC itself has recognized that the present regulation does not proscribe hypothecation of fully paid for securities of particular customers unless the total hypothecation exceeds the aggregate indebtedness of all customers to the firm.

In an interpretative release issued in conjunction with Rule 8c-1 by the SEC, the Commission itself defined the scope of the Rule as follows (2 CCH Federal Securities Law Reporter ¶22, 429 [1973]):

> "Generally speaking, brokers should have no difficulty in complying with the requirement of paragraph (a)(3) that a broker must not pledge his customers' securities for a sum which, in the aggregate, is greater than the total amount that his customers owe to him on securities carried for their accounts. Good brokerage practice alone would make it desirable for a broker to borrow substantially less on customers' securities than customers owe him. There should thus be a 'cushion' of his own capital between the amount of customers' debits and the amount of the broker's bank loans on customers' securities. This 'cushion' should be sufficient in size to absorb any reasonably anticipated reductions in customers' indebtedness." (Emphasis supplied.)

And in commenting on present Rule 8c-1 and certain proposed changes to it, Ezra Weiss, Counsel to the New York Regional Office of the Securities and Exchange Commission wrote in REGISTRATION AND REGULATION OF BROKERS AND DEALERS, p. 95, n. 5 (BNA, 1965);

> "Paragraph (a)(3) of the rule. The Commission has under consideration the recommendation of the Special Study Report for rules requiring a 'reasonable relationship' between the amount of each customer's securities that can be hypothecated or lent by a broker-dealer and the amount of the particular customer's indebtedness. (Citations omitted.) The present rule is a restriction on the overall amount which can be borrowed on customers' securities in relation to aggregate indebtedness of all customers." (Emphasis supplied.)

The proposed rule change was never implemented and another proposed amendment has been pending since 1971 (2 CCH

Federal Securities Law Reporter, ¶22, 422 [1973]).

And as this Court recently noted in Perine v. William Norton & Co., Inc., 509 F. 2d 114, 120 (2d Cir. 1974):

> "The interpretation of a regulation or statute by a regulatory agency that is charged with administering it is given considerable deference by federal courts, (citations omitted), so long as it is not clearly unnatural or unreasonable. Such deference is usually justified on the basis of the agency's superior expertise in the area of its authority. (Citation omitted.) * * * The S.E.C. is charged with supervising the enforcement and application of the nation's federal securities laws * * * and is thus uniquely suited to determine what interpretation of its rule best effectuates the purposes of * * * the * * * securities statutes."

See also, II Loss, L., SECURITIES REGULATION, 2d Ed., p. 1200 (1961), in which Professor Loss distinguishes the New York State provision dealing with hypothecation of customers' securities (former Penal Law §956, now General Business Law §339-e)* as being in some respects more strict than §8(c) of

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*The New York statute provides as follows (General Business Law, §339-e):

> "Any person, firm, association or corporation engaged in the business of purchasing and selling as a broker or dealer stocks, bonds or other evidences of debt of corporations, companies or associations, who
>
> * * *
>
> 2. Having in his or its possession stocks, bonds or other evidences of debt of a cor-

the Exchange Act" and points out that unlike the New York Statute the federal regulation does not prohibit the hypothecation of particular customers fully paid for securities:

> "* * * Whereas Clause (3) of §8(c) speaks in terms of the aggregate indebtedness of all customers and makes the customer's consent irrelevant, the comparable New York provision prohibits the hypothecation of a particular customer's securities for more than the amount of the broker's lien on those particular securities unless the customer consents." (Emphasis as in original, footnote omitted.)*

To be sure, the language of the statute (15 U.S.C.

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fn contd.,

> poration, company or association belonging to a customer on which he or it has a lien for indebtedness due to him or it by the customer, pledges the same for more than the amount due to him or it thereon, or otherwise disposes thereof for his or its own benefit, without the customer's consent, and without having in his or its possession or subject to his or its control, stocks, bonds or other evidences of debt of the kind and amount to which the customer is then entitled, for delivery to him upon his demand therefor and tender of the amount due thereon, is guilty of a misdemeanor."

*Professor Loss cites the following example (II Loss, L., SECURITIES REGULATION, Supplement to 2d Ed., p. 3204 [1969]):

> "* * * under 8(c)(3), theoretically, a broker-dealer owed $100,000 in margin accounts by all customers could hypothecate one customer's securities for that sum even though that one customer owed a much lesser amount." (Emphasis supplied.)

§78h) and the rule promulgated thereunder (17 C.F.R. §240.8c-1) differs. But any suggestion that there could be a violation of the statutory language and at the same time compliance with the rule promulgated under the statute--as might be the hypothecation of fully paid for securities--is erroneous. Aside from the plain language of the statute which punishes only the contravention of the Commission's rules and regulations, Section 23(a) of the 1934 Act itself (15 U.S.C. §78w[a]) forecloses such a possibility. That section provides as follows:

> "The Commission * * * shall * * * have power to make such rules and regulations as may be necessary for the execution of the functions vested in them by this chapter * * *. No provision of this chapter imposing any liability shall apply to any act done * * * in good faith in conformity with any rule or regulation of the Commission * * *." (Emphasis supplied.)

Thus, the hypothecation of customers' securities--even if fully paid for--for a total amount less than the aggregate indebtedness of all customers on all of their securities is "in conformity with" Rule 8c-1 and cannot be violative of Section 8 of the 1934 Act.

Simply put, the allegation in Count 9 that appellant hypothecated "fully paid for securities carried for the account of customers" fails to state a criminal offense absent an allegation that the amount for which the customers' securities were pledged exceeded the aggregate indebtedness of all customers in respect of securities carried for their accounts.

POINT II

EUCKER RELIES UPON THE FOREGOING POINT AND THOSE OF OTHER APPELLANTS IN THIS CASE INSOFAR AS APPLICABLE

CONCLUSION

The judgment of conviction should be reversed and Count 9 of the indictment dismissed.

Respectfully submitted,

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August 27, 1975

APPENDIX FOR DEFENDANT

-APPELLANT EUCKER

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RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
9-10-74	Filed indictment.
2-13-75	Filed OPINION #71877.
3-14-75	Deft. Eucker & Atty. (Stanley S. Arkin, Esq.) present. Def. withdraws his plea of not guilty & pleads guilty to count 9 only.
3-13-75	Filed Memorandum and Order that after reviewing the papers submitted on behalf of this application, it is the court's view that the motion should be denied.
6-23-75	Filed deft. D. Eucker's notice of motion re: dismiss count 9, etc.
6-23-75	Filed Govt.'s bill of particulars and response to motions for discovery and to dismiss the indictment.
6-23-75	Filed memo. of law in support of deft.'s D. Eucker motion to dismiss counts 2 through 7 of the indictment.
6-23-75	Filed deft. D. Eucker's notice of motion re: dismiss cts. 2-7.
6-23-75	Filed memo. of law in support of deft. Eucker's motion for dismissal of counts 2-7.
6-25-75	Filed deft. Donald Eucker's notice of appeal from judgment of 6-16-75.
6-30-75	DONALD EUCKER (atty. present) Filed JUDGMENT.

INDICTMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA, :

- v - : INDICTMENT

FERGUS M. SLOAN, JR., : 74 Cr. 859
CARL W. ANDERSON,
DONALD EUCHER, :
JOHN J. VILLANI, and
THOMAS C. KILDUFF, :

Defendants. :

- x

The Grand Jury charges:

Introduction

1. At all times relevant herein, Orvis Brothers & Co. ("Orvis"), a New York limited partnership doing business as a securities brokerage firm, was a member of the New York and American Stock Exchanges and the National Association of Securities Dealers, Inc., having its principal place of business at 30 Broad Street, New York, New York. Orvis transacted a business in securities on its own behalf and on behalf of approximately 23,000 customers. In 1969 and 1970 Orvis experienced substantial losses which endangered its net capital and impaired its ability to remain solvent. As of June 3, 1970, Orvis was suspended as a member of the New York and American Stock Exchanges.

2. The defendant FERGUS M. SLOAN, JR., at relevant times herein, was the managing partner of Orvis and, as such, had and exercised the overall responsibility for Orvis' operations.

3. The defendant CARL W. ANDERSON, at relevant times herein, was the Chairman of the Executive Committee of Orvis and, as such, had the responsibility of assuring that the policies of the Executive Committee were enforced. In addition, ANDERSON was the partner in charge of corporate finance.

4. The defendant DONALD EUCKER, at relevant times herein, was the partner in charge of operations at Orvis and a member of the Executive Committee. As such, EUCKER was responsible for the day to day operation of Orvis, including the supervision of "cage" operations and maintaining proper segregation of customer-fully-paid-for securities.

5. The defendant JOHN J. VILLANI, at relevant times herein, was a partner and a member of the Executive Committee.

6. The defendant THOMAS C. KILDUFF, at relevant times herein, was the partner in charge of financial operations and a member of the Executive Committee.

INDICTMENT

COUNT ONE

The Conspiracy

The Grand Jury further charges:

1. From on or about the 1st day of September, 1968, up to and including the 30th day of June, 1971, in the Southern District of New York and elsewhere, FERGUS M. SLOAN, JR., CARL W. ANDERSON, DONALD EUCKER, JOHN J. VILLANI, and THOMAS C. KILDUFF, the defendants, and Orvis, named herein as a co-conspirator but not as a defendant, and others to the Grand Jury known and unknown, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other to commit offenses against the United States and to violate the following laws of the United States: Title 15, United States Code, Sections 78g, 78h, 78j(b), 78q(a) and 78ff; 12 C.F.R. 220; 17 C.F.R. Sections 240.8c-1, 240.10b-5, 240.17a-3, 240.17a-4, 240.17a-5.

OBJECTS OF THE CONSPIRACY

2. It was part of said conspiracy that said defendants and their co-conspirators unlawfully, wilfully and knowingly would, directly and indirectly, hypothecate and arrange for and permit the continued hypothecation of fully paid for securities carried for the account of customers of Orvis under circumstances that permitted such securities to be hypothecated and subjected to liens and claims of pledgees.

3. It was further a part of said conspiracy that said defendants and their co-conspirators unlawfully, wilfully and knowingly would, directly and indirectly, by the use of means and instrumentalities of interstate commerce, of national securities exchanges, and of the mails, use and employ manipulative and deceptive devices and contrivances in connection with the purchase and sale of securities in contravention of Rule 10b-5 (17 C.F.R. Section 240.10b-5), a rule prescribed by the United States Securities & Exchange Commission (S.E.C.) as necessary and appropriate in the public interest and for the protection of investors.

4. It was further a part of said conspiracy that said defendants and their co-conspirators unlawfully, wilfully and knowingly would, directly and indirectly, make, keep and preserve and cause to be made, kept and preserved false and fraudulent books, accounts and other records of Orvis which purported to reflect the true, accurate and current financial condition of Orvis, when in truth and in fact as the defendants well knew, said books, accounts and other records were materially false and fraudulent, in contravention of Rules 17a-3 and 17a-4 (17 C.F.R. Sections 240.17a-3 and 240.17a-4), rules prescribed by the S.E.C. as necessary and appropriate in the public interest and for the protection of investors.

5. It was further a part of said conspiracy that said defendants and their co-conspirators unlawfully, wilfully and knowingly would, directly and indirectly, make and cause to be made false and misleading statements in applications, reports and documents required to be filed with the S.E.C., which statements were false and misleading with respect to a material fact or facts, in contravention of Rule 17a-5 (17 C.F.R. Section 240.17a-5), a rule prescribed by the S.E.C. as necessary and appropriate in the public interest and for the protection of investors.

6. It was further a part of said conspiracy that the defendants and their co-conspirators unlawfully, wilfully and knowingly, would, directly and indirectly, extend credit and arrange for the extension and maintenance of credit to and for customers of Orvis on securities in contravention of Regulation T of the Board of Governors of the Federal Reserve System (12 C.F.R. Section 220), a regulation prescribed by the Federal Reserve System for the purpose of preventing the excessive use of credit for the purchase or carrying of securities.

INDICTMENT

MEANS OF THE CONSPIRACY

7. Among the means by which the defendants and their co-conspirators would and did carry out the conspiracy were the following:

(a) In or about April, 1969, the defendants SLOAN, ANDERSON, EUCKER, VILLANI, and KILDUFF, discovered that Orvis was in violation of New York Stock Exchange Rule 325 which prohibits a member firm's aggregate indebtedness to exceed twenty times its net capital. Instead of reporting the serious financial condition of Orvis to the Exchange and SEC, as required, the defendants and their co-conspirators would and did engage in a course of conduct to fraudulently conceal the true financial condition of Orvis.

(b) The defendants SLOAN, ANDERSON, VILLANI, EUCKER and KILDUFF and others would and did show as valid present income and good capital on the books and records of Orvis projected commissions receivable from Clinton Oil Company ("Clinton") on the sale to the public of an estimated $20,000,000.00 of participating interests in Clinton Oil and Gas Programs in 1969. In order to accomplish this the defendants would cause the opening of a customer's cash account in the name of Clinton Oil Company to record projected commissions receivable in 1969 in the amount of

$797,100.00 and to reflect the account on the books and records of Orvis so as to overstate the firm's capital in the 17A-5 report filed with the SEC on October 16, 1969.

(c) The defendant KILDUFF with the consent of the other defendants would cause the omission of certain expenses, namely commissions payable to the firm's sales representatives, from the books and records of Orvis for the purpose of overstating the firm's net capital.

(d) The defendants SLOAN, EUCKER and KILDUFF with the consent of the other defendants, would use $500,000.00 paid to Orvis on August 22, 1969, on account of the commissions receivable from Clinton, to offset losses in excess of $1,000,000.00 realized in 1969 in the Orvis trading account without reducing the outstanding debit in the Clinton receivable account.

(e) The defendants SLOAN, EUCKER, and KILDUFF with the consent of the other defendants would and did post without cost as securities in the firm's capital in April and May, 1969, 9,344 shares of Clinton Oil common stock, valued at $275,000.00, which the defendants well knew had been delivered for sale by a customer.

(f) The defendants SLOAN and EUCKER with the consent of the other defendants would and did reduce the firm's capital investment subject to 30% haircut provision of Rule 325. In order to accomplish this SLOAN and EUCKER would and did cause the posting on the books and records of a phony sale of 80,000 shares of Clinton Oil common stock for $880,000.00 to the Clinton Oil Pension Fund.

(g) The defendants SLOAN, ANDERSON, EUCKER, VILLANI and KILDUFF would and did cause the extension and maintenance of credit to customers' cash accounts in violation of Reg T including but not limited to the following:

	DEBIT BALANCE 8/31/69
MARTIN ACCOUNT (52-6042)	$326,000.00
BOZEMAN ACCOUNT (14-1682)	$133,000.00
FUND OF LETTERS ACCOUNT (05-6910)	$484,000.00
AQUARIOUS ACCOUNT (03-4862)	$ 32,740.00

(h) The defendant EUCKER with the consent of the other defendants and others would and did permit and cause as a regular business practice in 1969 and 1970 the hypothecation of fully paid for securities held by Orvis for the account of customers to bank and stock loans obtained for the benefit of Orvis in amounts in excess of $7,000,000.00.

OVERT ACTS

In furtherance of said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York and elsewhere:

1. On or about February 5, 1969, the defendant ANDERSON caused Orvis to issue a check to Mrs. Rosa Bull in the amount of $201,778.75 on account of the sale of 8,425 shares of unregistered International Control stock with knowledge that said trade had been disclaimed by the alleged purchaser of the stock.

2. On or about April 16, 1969, the defendants SLOAN and KILDUFF with the consent of ANDERSON, EUCKER and others caused the receipt without cost of 4,344 shares of Clinton Oil stock into the Orvis trading account (62-2070) which were delivered to Orvis for sale for the account of a customer.

INDICTMENT

3. In or about April, 1969, the defendant KILDUFF told the other defendants that he estimated the ratio of Orvis' aggregate indebtedness to net capital to be in excess of 30:1. At that time each defendant agreed that everything should be done to keep the firm in business, including the falsification of the books and records of Orvis.

4. On or about April 30, 1969, the defendants SLOAN, EUCKER and KILDUFF with the consent of the other defendants, caused the erroneous posting in the customers cash account captioned Clinton Oil Company (55-1400) a cash debit of $797,100.00.

5. On or about May 15, 1969, the defendants SLOAN and KILDUFF caused the receipt without cost of 5,000 shares of Clinton Oil stock into the Orvis trading account (62-2070) when in fact the shares were delivered for sale to the firm at a fixed price.

6. On or about August 20, 1969, the defendants attended a General Partners Meeting of Orvis held at the New York Athletic Club in New York City.

7. On or about August 22, 1969, the defendants SLOAN, EUCKER and KILDUFF caused the erroneous credit to the Orvis Trading Account (62-2075) of $500,000.00 received as advance payment on commissions receivable from Clinton.

INDICTMENT

8. On or about August 28, 1969, the defendants SLOAN, EUCKER and KILDUFF caused the transfer of securities from a subordinated loan account to the Clinton Oil Account (55-1400).

9. On or about August 28, 1969, the defendants SLOAN and ANDERSON caused the erroneous posting of a sale of 80,000 shares of Clinton Oil for $880,000.00 from the Orvis Trading and Investment Accounts (62-2075, 62-2080) to the Clinton Oil Pension Fund.

10. On or about September 3, 1969, the defendants received a telegram from Clinton Oil refusing to confirm the 80,000 share trade.

11. In or about September, 1969, the defendant SLOAN met with Rick Clinton in Wicheta, Kansas.

12. On or about October 16, 1969, the defendants SLOAN, ANDERSON, EUCKER, VILLANI and KILDUFF caused the filing of a materially false and incomplete Financial Questionnaire (Form X17a-5) by Orvis with the SEC in New York City.

13. In or about the first week of December, 1969, the defendant SLOAN caused the mailing of a customers' statement to the Clinton Oil Pension Fund.

14. On or about December 8, 1969, the defendant SLOAN received a telegram for Clinton Oil disclaiming an alleged $880,000.00 due Orvis for the purchase of 80,000 shares of Clinton Oil common stock.

15. In or about October and November, 1969, the defendant EUCKER told an employee of Orvis to use customers' fully paid securities as collateral on bank loans obtained by Orvis.

16. In or about October and November, 1969, the defendant EUCKER with the consent of the other defendants instructed employees of Orvis to continue the extension of credit to certain customers cash accounts which were in violation of Reg. T.

(Title 18, United States Code, Section 371.)

COUNTS 2 THROUGH 7

The Grand Jury further charges:

1. From on or about the 1st day of March 1969, up to and including the 16th day, of October, 1969, in the Southern District of New York, Orvis Brothers & Co., 30 Broad Street, New York, New York ("Orvis"), a member of a national securities exchange, directly transacted business in securities directly with and for others not members of a national securities exchange and, further,

was a broker or dealer registered pursuant to Section 15 of the Securities Exchange Act of 1934, as amended, and therefore was required by law [17 C.F.R. 240-17a-3(a)] to make and keep accurate and current books and records.

2. From on or about the 1st day of March, 1969, up to and including the 16th day of October, 1969, FERGUS M. SLOAN, JR., CARL W. ANDERSON, DONALD EUCKER, JOHN J. VILLANI, and THOMAS C. KILDUFF, the defendants, unlawfully, wilfully and knowingly, did falsely make and maintain Orvis' books and records in a fashion which represented that Orvis' financial condition was sound when, in truth and in fact, as the defendants then and there well knew, Orvis was in serious financial trouble and was suffering significant losses which substantially impaired, and threatened to impair, its ability to remain solvent, which books and records hereinafter listed, were not current and accurate as hereinafter described:

OUNT	DATE OF FALSE ENTRY	FALSE ENTRY	DEFENDANTS
2 .	4/30/69	Recording of $797,100 as a debit in the Orvis' cash account (55-1400), captioned Clinton Oil Co. 1[illegible]9 Oil units.	Sloan Anderson Eucker Villani Kilduff

INDICTMENT

COUNT	DATE OF FALSE ENTRY	FALSE ENTRY	DEFENDANTS
3	8/26/69	Recording of $500,000 as a credit to Orvis' Firm trading account (62-2075).	Sloan Anderson Eucker Villani Kilduff
4	8/28/69	Transferring of securities from R.P. Clinton's subordinated loan account (06-8808), to account 55-1400 to secure the debit balance	Sloan Anderson Eucker Villani Kilduff
5	8/28/69	Recording of a fictitious sale by Orvis of 80,000 shares of Clinton Oil stock for $880,000 to the Clinton Oil Co. Pension Fund, (Account No. 06-2075).	Sloan Anderson Eucker Villani Kilduff
6	4/16/69	Recording of 4,344 shares of Clinton Oil stock without attributing cost to the Firm trading account, 62-2070	Sloan Anderson Eucker Villani Kilduff
7	5/20/69	Recording of 5,000 shares of Clinton Oil stock without attributing cost to the Firm trading Account, 62-2070	Sloan Anderson Eucker Villani Kilduff

(Title 15, United States Code, Sections 78q(a) and 78ff, 17 C.F.R. Section 240.17a-3).

INDICTMENT

COUNT 8

The Grand Jury further charges:

1. Orvis Brothers & Co., (Orvis) was a brokerage firm, a member of the New York Stock Exchange and American Stock Exchange, and was registered as a broker and dealer pursuant to Section 15 of the Securities Exchange Act of 1934, as amended, and therefore was required by law (17 C.F.R. 240-17a-5), to file for the 1969 fiscal year a report of financial condition containing the information required by Form X-17A-5.

2. On or about the 16th day of October, 1969, in the Southern District of New York, FERGUS M. SLOAN, JR., CARL W. ANDERSON, DONALD EUCKER, JOHN J. VILLANI, and THOMAS C. KILDUFF, the defendants, unlawfully, wilfully and knowingly did make, and cause to be made, statements in an X-17A-5 report of financial condition of Orvis which statements were false and misleading with respect to material facts in that:

a) Statements of the trading and investment accounts of Orvis were falsely inflated.

b) Statement of the correction of customers' fully paid securities loaned and pledged in error was false.

c) Statement of balances in customers' cash accounts was falsely inflated.

(Title 15, United States Code, Section 78q(a) and 78ff and 17 C.F.R. Section 240.17a-5; Title 18, United States Code, Section 2.)

COUNT 9

The Grand Jury further charges:

1. From August 1, 1969 to June 3, 1970, Orvis Brothers & Co., was a brokerage firm, a member of the New York Securities and Exchange, and a registered broker and dealer pursuant to Section 15 of the Securities and Exchange Act of 1934, and, as such, was subject to the provisions of Rule 8c-1 (17 C.F.R. Section 240.8c-1), a rule prescribed by the S.E.C. for the protection of investors.

2. From on or about the 1st day of August, 1969 up to and including the 3rd day of June 1970, in the Southern District of New York, FERGUS M. SLOAN, JR., CARL W. ANDERSON, DONALD EUCKER, JOHN J. VILLANI, and THOMAS C. KILDUFF, the defendants, unlawfully, wilfully

and knowingly, did, directly and indirectly, hypothecate and arrange for and permit the continued hypothecation of fully paid for securities carried for the account of customers of Orvis under circumstances that permitted such securities to be hypothecated and subjected to liens and claims of pledges in amounts up to $7,000,000.00.

(Title 15, United States Code, Sections 78h and 78ff and 17 C.F.R. Section 240.8c-1; Title 18, United States Code, Section 2.)

FOREMAN

PAUL J. CURRAN
United States Attorney

NOTICE OF MOTION FOR ORDER
DISMISSING COUNT 9

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA, :

:

-against- :

:

DONALD EUCKER, et al., :

Defendants. :

----------X

NOTICE OF MOTION

74 Cr. 859
(WK)

S I R :

PLEASE TAKE NOTICE that upon the indictment, the memorandum of law submitted herewith, the motion to dismiss Count 9 made in behalf of defendant Anderson and the memorandum of law submitted therewith, and all prior proceedings, defendant Eucker joins in defendant Anderson's motion to dismiss Count 9 and will move this Court before the Honorable Whitman Knapp, United States District Judge, Southern District of New York, at the United States Courthouse, Foley Square, New York, New York, on April 2, 1975, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an inspection by this Court of the grand jury minutes pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, a dismissal of Count 9 and portions of Count 1, pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure and the Fifth and Sixth Amendments to the

NOTICE OF MOTION FOR ORDER
DISMISSING COUNT 9

United States Constitution, and such other and further relief as to the Court may seem just and proper.

DATED: New York, New York
March 12, 1975

Yours, etc.,

STANLEY S. ARKIN, P.C.
Attorneys for Defendant
Donald Tucker
300 Madison Avenue
New York, New York 10017

By: Stanley S. Arkin
Stanley S. Arkin

TO:

HONORABLE PAUL J. CURRAN
United States Attorney
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

MOTION FOR ORDER DISMISSING COUNT 9

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
-against-	:	MOTION FOR INSPECTION OF GRAND JURY MINUTES AND DISMISSAL
DONALD EUCKER, et al.,	:	74 Cr. 859 (WK)
Defendants.	:	

Defendant, Donald Eucker, moves pursuant to Rules 6(e) and 12(b) of the Federal Rules of Criminal Procedure and the Fifth and Sixth Amendments to the United States Constitution for an inspection of the grand jury minutes and an order dismissing Counts 9 and portions of Count 1 upon the grounds that the indictment fails to allege an essential element of the crimes charged in those counts and that no evidence of that essential element was presented to the grand jury.

DATED: New York, New York
March 12, 1975

Respectfully submitted,

STANLEY S. ARKIN, P.C.
Attorneys for Defendant,
Donald Eucker
300 Madison Avenue
New York, New York 10017

By: Stanley S. Arkin

MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR ORDER DISMISSING COUNT 9

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA, :

:

-against- : 74 Cr. 859
: (WK)

DONALD EUCKER, et al., :

Defendants. :

----------X

MEMORANDUM OF LAW SUBMITTED IN SUPPORT OF DEFENDANT EUCKER'S MOTION FOR AN INSPECTION OF THE GRAND JURY MINUTES AND A DISMISSAL OF COUNT 9 AND PORTIONS OF COUNT 1

This memorandum is submitted in support of defendant Donald Eucker's motion, made pursuant to Rules 6(e) and 12(b) of the Federal Rules of Criminal Procedure, for an inspection by this Court of the minutes of all grand jury proceedings which resulted in the instant indictment and an order dismissing Count 9 and certain portions of Count 1.

It is submitted that Count 9 (charging Eucker and others with violating Title 15 U.S.C. §78h and regulations promulgated thereunder--the rule which forbids the hypothecation by member firms of customers' securities in certain circumstances) and portions of Count 1 (charging Eucker and others with conspir-

ing to violate the hypothecation rules) fail to allege an essential element of the crimes charged, to wit, that the securities purportedly hypothecated or agreed upon to be hypothecated were for a sum exceeding "the aggregate indebtedness of all customers in respect of securities carried for their accounts." These counts allege only that customers' fully paid for securities were hypothecated, but do not even make any pretense at specifying whether the alleged hypothecation was in excess of the "aggregate indebtedness." The allegation that "fully paid for securities" were hypothecated is not the same as an allegation that the total amount hypothecated at any one time exceeded the aggregate indebtedness of all of Orvis' customers on all of their securities at that time.

It is further submitted that an inspection of the grand jury minutes will reveal that there was no evidence before the grand jury that the aggregate indebtedness of all of Orvis' customers in respect of securities carried for their accounts exceeded the amount of the hypothecation. Accordingly, Count 9 and Count 1 insofar as it charges a conspiracy to violate the hypothecation rule are defective on their face as well as being unsupported by any grand jury evidence and must be dismissed.

Section 8 of the Securities Exchange Act of 1934 (15 U.S.C. §78h) makes it unlawful, inter alia, for any broker or

dealer:

> "In contravention of such rules and regulations as the Commission shall prescribe for the protection of investors to hypothecate or arrange for the hypothecation of any securities carried for the account of any customer under circumstances * * * that will permit such securities to be hypothecated, or subjected to any lien or claim of the pledgee, for a sum in excess of the aggregate indebtedness of such customers in respect of such securities." (Emphasis supplied.)

Pursuant to the authority delegated by the statute, the S.E.C. promulgated Rule 8c-1 (17 C.F.R. §240.8c-1) which purports to define the conduct made unlawful by the statute. The pertinent provisions of Rule 8c-1 are as follows:

> " * * * no broker or dealer * * * shall * * * hypothecate or arrange for or permit the continued hypothecation of any securities carried for the account of any customer under circumstances--
> (3) that will permit securities carried for the account of customers to be hypothecated, or subjected to any lien or claim or claims of the pledgee or pledgees, for a sum which exceeds the aggregate indebtedness of all customers in respect of securities carried for their accounts * * *."

Thus, although Section 8 of the 1934 Act arguably would permit the enactment of an S.E.C. rule proscribing the hypothecation of a particular customer's securities for a sum greater than the aggregate indebtedness of that customer on those securities, the existing S.E.C. rule--which defines the only conduct made unlawful by Section 8 of the Act--does not do so. The S.E.C.

rule only limits the total amount which can be borrowed on customers' securities in relation to the total indebtedness of all customers on all of their securities.

In commenting on this very provision of Rule 8c-1, Ezra Weiss, Counsel to the New York Regional Office of the Securities and Exchange Commission, wrote in Registration and Regulation of Brokers and Dealers (BNA, 1965):

> "Paragraph (a)(3) of the rule. The Commission has under consideration the recommendation of the Special Study Report for rules requiring a 'reasonable relationship' between the amount of each customer's securities that can be hypothecated or lent by a broker-dealer and the amount of the particular customer's indebtedness. (Citations omitted.) The present rule is a restriction on the over-all amount which can be borrowed on customers' securities in relation to aggregate indebtedness of all customers." (Emphasis supplied.)

The proposed rule change was never implemented and another proposed amendment has been pending since 1971 (see, CCH, Federal Securities Law Reporter, Vol. 2, ¶22,422, p. 16,306).

Count 9 and Paragraphs 1 and 2 of Count 1 charge the hypothecation of "fully paid for securities" and a conspiracy to hypothecate "fully paid for securities." Again, the indictment absolutely fails to allege that the total amount hypothecated exceeded the aggregate indebtedness of all of Orvis' customers on all of their securities--an essential element of the crime charged and defined by Section 8 of the 1934 Act (15 U.S.C. §78h)

and Rule 8c-1 (17 C.F.R. §240.8c-1).

That the securities allegedly hypothecated were "fully paid for," i.e., there was no indebtedness on "such securities," is irrelevant under the statute and S.E.C. rule. The mere hypothecation of fully paid for securities is not a crime under the sections alleged to have been violated unless the total amount hypothecated "exceeds the aggregate indebtedness of all customers in respect of securities carried for their accounts."

It follows that Count 9 and Count 1 insofar as it charges a conspiracy to violate the hypothecation rule fails to charge a violation within the scope of 15 U.S.C.§78h and 17 C.F.R.§240.8c-1 and must be dismissed.

Because the indictment fails to allege an essential element of the crimes charged, it is reasonably certain that the grand jury was presented no evidence of that element, to wit, that the total amount hypothecated exceeded the total indebtedness of all Orvis' customers on their securities. Such a failure of grand jury proof amounts to a violation of Eucker's Fifth and Sixth Amendment rights to be tried only on crimes of which he has been accused by a grand jury.

As the Supreme Court wrote in Russell v. United States, 369 U.S. 749, 769 (1962):

> "To allow the prosecutor, or the court, to make a subsequent guess as to what was in

> the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him * * *."

The failure of the indictment to charge an essential element of the crimes pleaded in Count 9 and Paragraph 2 of Count 1, and the lack of grand jury proof of that essential element requires their dismissal.

CONCLUSION

Defendant Eucker's motion for inspection of the grand jury minutes and a dismissal of Count 9 and a portion of Count 1 should be granted.

March 12, 1975.

Respectfully submitted,

STANLEY S. ARKIN, P.C.
Attorneys for Defendant
Donald Eucker
300 Madison Avenue
New York, New York 10017

STANLEY S. ARKIN
MARK S. ARISOHN
Of Counsel

emb 2

(Case called.)

MR.ARKIN: Ready for Mr. Eucker.

MR. DEVINE: Ready for the Defendant Kilduff.

THE COURT: With respect to the Defendant Eucker, there is a motion pending before me to dismiss the 7th count--

MR. ARKIN: The 9th count. The 7th has been dismissed already.

THE COURT: --to dismiss the 9th count and, as I indicated when you were arguing in chambers, I was inclined to decline your motion, and I have now firmly decided to deny it.

I think it would probably be a fair statement that the statute is not the model of clarity which you would use in law school to illustrate how a statute should be drafted, but the Court of Appeals in the Schwartz case has told us we should construe it liberally, broadly.

And in speaking of this specific provision, on Page 507 of 464, Fed. 2d it speaks, at footnote 10--

MR. ARKIN: I have looked at the statute.

THE COURT: --it speaks of this exact statute in the exact language.

emb 3

MR. ARKIN: There are only two reported cases on this statute.

THE COURT: And of course it wasn't before the Court.

MR. ARKIN: Yes, that issue is not before the Court. And I agree with your Honor that the statute is not a model of clarity. It has not been in any way clarified over the passage of years, but it seems to me that if there is ambiguity it is very much in the other direction, and I understand your Honor's ruling and I believe your Honor understands my intention with respect to the plea that is to be offered today which is to have my client, Mr. Eucker, plead to the indictment as drafted, and of course denying that the aggregate net indebtedness of all the customers exceeded the amount of the hypothecation, and then taking that up upstairs for a hopeful clarification of what the statute means.

THE COURT: Well, as you know, it has always been my view that the state practice, which permits a plea and then an appeal, is far preferable to ours, and if you can prevail upon the Court to accept your theory that in this situation they should accept it on appeal, I think it would be a constructive move for the administration of justice.

TRANSCRIPT OF PROCEEDINGS,
PLEA, MARCH 14, 1975

MR. ARKIN: And you will be in favor of that?

THE COURT: Yes.

MR. ARKIN: So under Rule 11, I take it that the allocution with respect to that particular element will be left standing?

THE COURT: Yes. I just will add one thing to my views on this statute: this isn't reaching out and defining a new undreamed-of crime. After all, hypothecating securities which belong to someone else is common-law larceny so that it is not really a new crime that we are dreaming up which has a bearing on law, I feel, about the statute.

MR. ARKIN: I understand the theory on which the statute might have been based.

THE COURT: Anyway, I wish you luck in having it clarified.

MR. ARKIN: Thank you.

THE COURT: Has the defendant an application to make?

MR. DEVINE: Yes, your Honor, the Defendant Kilduff, wishes to withdraw his plea of not guilty to the indictment and enter a plea of guilty.

THE COURT: A plea of guilty to the entire indictment?

TRANSCRIPT OF PROCEEDINGS,
PLEA, MARCH 14, 1975

continue.

MR. FEINBERG: He is on an unsecured bond, your Honor.

THE COURT: Will you see that he gets to the Probation Department?

MR. DEVINE: Yes, your Honor.

THE COURT: Mr. Arkin, do you have an application?

MR. ARKIN: Yes. Mr. Eucker asks leave to withdraw his plea of not guilty to Count 9 of the indictment, to plead guilty to that count with the distinct understanding that the remaining counts in the indictment, Counts 1 and 8, will be dismissed at the time of sentencing.

THE COURT: The understanding is not that they will be dismissed but that you will move their dismissal and the Government will not oppose. So far, at least, I have never denied such a motion.

MR. ARKIN:: Excuse me for being presumptuous, your Honor. That was a presumptuous statement.

It is my expectation, based upon ordinary custom and practice, that those two counts will be dismissed at the time of sentencing.

Count 9, if your Honor please, is a

hypothecation count. Mr. Bucker wishes to plead guilty to that count and states to the Court that while he was Operations Manager of Orvis Brothers, a member firm of the New York Stock Exchange, a now defunct member firm of the New York Stock Exchange, that during the period he worked in what might be called the backroom, or the cage; that certain securities fully paid for by customers of Orvis Brothers were hypothecated, which I believe is what the substance of Count 9 is.

The count doesn't charge--

THE COURT: I assume that he admits that he knew they were not hypothecated and he knew they were fully paid for and he participated.

MR. ARKIN: Well, he caused or permitted their hypothecation, is the way I believe the indictment reads, and the way he also pleaded to it.

THE COURT: And he knowingly did that.

MR. ARKIN: And he knowingly did that, yes, your Honor.

Is that correct?

THE DEFENDANT: Yes, sir.

MR. ARKIN: In the course of this plea, as I made clear yesterday during the conference in your Honor's chambers and earlier this morning, Mr. Bucker

would deny that he either had knowledge or, for that matter, that the fact existed that the hypothecation of any securities or the total hypothecation of securities by Orvis exceeded the aggregate net indebtedness of all Orvis customers. That is not pleaded in the indictment. That is not alleged in the indictment.

We, of course, have made a motion addressed to that defect which has been denied, and Mr.--the motion has been denied.

THE COURT: The alleged defect?

MR. ARKIN: The claimed defect, yes, your Honor. And Mr. Eucker denies that element.

THE COURT: I understand Mr. Feinberg believes the Government can prove it but that's neither here nor there; you deny it.

MR. FEINBERG: I just ask that at the allocution they make a statement that this was done knowingly and knowing that it was wrong to do so.

THE COURT: That doesn't make any difference. If he knew he did it, that's enough.

MR. ARKIN: He did what we said just a moment ago knowingly.

As to its moral wrongness or rectitude, I will comment on that at a later time.

THE COURT: Is there anything else you want to add?

MR.ARKIN: It is not by way of a legal defense to the count, but my client did ask me to say to the Court--and I don't know whether it is more appropriate now or at the time of sentencing--but so that I don't feel uncomfortable as I leave the courtroom, I should say that it was his position that when he came into Orvis as Operations Manager, that is, when he took over that post, that the practice of hypothecation of fully paid-for securities had been going on for many years, approximately 15 years, and so he inherited that practice, albeit he countenanced its continuance. And he says further that it was a practice during the year of 1969 when things were ill on Wall Street, which was widely prevalent, and it would be his position that the practice, because of the dire financial straits of most firms, a practice which was winked at by the supervisory or regulatory agencies.

Now, I believe that to be more by way of mitigation.

THE COURT: That had nothing to do with the fact that the statute defines a crime, and you can't commit the crime just because other people are committing

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it.

BY THE COURT:

Q However, I understand, Mr. Eucker, there is no question that you knew that these securities were fully paid for, and there is no question that you knowingly--

MR. ARKIN: Hypothecated.

Q --hypothecated them; is that correct?

A That's a true statement, your Honor.

Q And you heard what I said to Mr. Eucker about his rights with respect to not pleading guilty.

MR. ARKIN: I believe you mean Mr. Kilduff.

THE COURT: Correct.

Q You heard what I said to Mr. Kilduff about his rights with respect to not pleading guilty and what the Government would have to do if he didn't plead guilty?

A Yes.

Q The same applies to you. The mere fact that you are guilty or not guilty has nothing to do with your right to stand trial.

A Yes, your Honor.

Q And Mr. Arkin being your attorney, I have no doubt that this has been thoroughly explained to you.

A It has, your Honor.

Q And you waive all those rights?

A Yes.

MR. ARKIN: We waive the reading of the indictment, we waive the jury trial we would have been otherwise entitled to, to confront witness and all the other panoply and constitutional rights that one accused of a crime has which I have fully explained to him.

THE COURT: Now, I would be unrealistic if I didn't mention that I have heard you discuss that it is my present impression that the Government doesn't think you are one of the prime movers or, as your counsel expressed it, high in the echelon of criminal responsibility, and I assume you may have the general impression that they will tell me that at the time of sentence.

I just want to impress upon you that my responsibility is to decide what happens at the time of sentence, and they may feel that your moral guilt is not as great as others and I may have a different view when I get through. I'm not threatening you, you understand, but I just want you to understand that I have neither formed nor expressed an opinion on the subject of what sentence should be imposed upon you, and I assume that nobody has represented to you that they know what I can do or that they know what I will do.

They know exactly what I can do, but they

don't know what I will do.

THE DEFENDANT: I understand.

BY THE COURT:

Q Has anybody suggested to you that they will have any influence on what I may do?

A Nobody has told me anything like that.

THE COURT: Anything else, Mr. Feinberg?

MR. FEINBERG: Nothing, your Honor.

THE COURT: All right, I will accept the plea.

MR. ARKIN: You can be sure, your Honor, that nobody has ever said that anybody has ever had any influence over this Court, particularly since the Knapp Commission hearings.

BY THE CLERK:

Q Are you the Donald Eucker in the case presently before this Court?

A Yes, I am.

Q Do you waive the formal reading of the indictment in this matter?

A Yes, I do.

Q Do you fully understand the charges in Count 9 of this indictment?

A Yes, I do.

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Q How do you wish to plead to that count?

A I wish to plead guilty.

THE COURT: All right. Same date for sentence. May 15, 1975 at 9:30 a.m.

MR. ARKIN: May I have the representation on the record with respect to the remaining two counts by Mr. Feinberg?

MR. FEINBERG: Yes. That representation is forthcoming.

MR. ARKIN: What is the representation?

THE COURT: Mr. Feinberg will not oppose your motion to dismiss.

MR. ARKIN: Thank you.

MR. FEINBERG: Your Honor, may I approach the bench for a moment.

THE COURT: Yes.

MR. ARKIN: What is the status of the personal recognizance bond?

THE COURT: That is continued.

MR. FEINBERG: The Government consents.

(Pleas concluded.)

think there is any more reason for singling out the stock exchange or people who invest or become partners in Orvis Brothers than there is singling out people in any other field.

We are not asking for more consideration, but we are begging your Honor in the case of this one poor individua not to give him less consideration than you would if it were some other type of a case. Thank you very much.

THE COURT: Do you want to say anything before your lawyer leaves?

DEFENDANT SLOAN: No, sir.

THE COURT: You may leave. You are excused if you want.

MR. COHN: Thank you, Judge Knapp, very much.

(Mr. Cohn left the courtroom.)

MR. ARKIN: If your Honor please, I would be interested in discussing sentencing theory too, but as the hour is late and the idea is general, I will confine myself to some brief remarks about my client, whom I consider to be a good and decent man, for whom jail would not be an appropriate sentence.

If your Honor please, I too, at the outset, will state that I had certain understandings from Mr. Feinberg, which put me in the unhappy position of having to say there

was almost the exact same representations that even Mr. Rosen or Mr. Cohn made, but I think I can put them in a more precise context. I also was shocked upon receiving a copy of this letter from Mr. Feinberg. When I discussed plea with Mr. Feinberg, he was very eager to see to it that Mr. Eucker did plead guilty. Obviously he was in favor of cutting down the torture of a four weeks' trial, cutting down the difficulty of having four lawyers, what have you. No question but that he was, as any prosecutor would, urgently seeking to resolve this thing short of going to trial. It was not the kind of trial which I suppose will get you on the front page of the Times every day and was not all that interesting, and so certainly there was a great urgency to have the plea.

In that context we had several discussions. In the course of those discussions Mr. Feinberg had said to me, "Don't worry, I am going to go to bat for your client." And he said that again, in an overall context of a conversation where he said to me, and I to him, he didn't regard Mr. Eucker as any kind of dangerous criminal, anybody of any malevolent intent, as somebody who had started out with some kind of scheme to defraud the community, or the stock exchange or the SEC, whoever else was the victim in this unusual case.

The discussions were very clear, which is that Mr. Feinberg, in return for our plea, while he could not

bind himself to a recommendation, would not make a recommendation, everybody knows that that is common patois in the office, that they cannot make a recommendation unless they want to, we all know that, but Mr. Feinberg said he would go to bat for my client, and he said so in the context that he did not believe my client was a very bad man, and that my client didn't do anything which was very evil, and my man was a decent human being, and that perhaps if wiser heads had prevailed the indictment might not have been drafted as it was, either by way of its content or dramatis personae.

Well, I took that into consideration, and I too have been around this courthouse and I know what a promise is and what a promise is not. I know what an expectation is and what an expectation is not. But my understanding was that nothing like this would take place.

It was I, as your Honor will recall, who telephoned you when I received a copy of the letter. I had an understanding that Mr. Feinberg would make no recommendation. Well, he made no recommendation, but he wrote something which I hardly label a love letter. My predecessor on the floor here used the word "poisonous" document. I will use other words just because I like to choose other words than he.

Certainly that document over here is not going to bat for my client. That document over here is batting him

over the head. It is a vicious document.

17 THE COURT: Did he say he was going to go to bat for your client if he cooperated or just if he pleaded?

MR. ARKIN: Your Honor, the context was -- and I must get on to that -- we talked about cooperation. I said I would turn him over to Mr. Feinberg and I did, but I also told Mr. Feinberg and I told him several times that my client denied from the first day he met me, through your Honor's good offices, this court's good offices, that he did anything wrong. I told Mr. Feinberg, so he would not buy a pig in a poke, which is very often an expression which your Honor knows is used around this courthouse, that I am not going to buy a pig in a poke, come in, give your story, we will use it if we want and then we will see from the goodness of our hearts. Those of us who have been around here don't buy pigs in a poke. I told Mr. Feinberg, "No, I have nothing to offer which is anything but exculpatory." I said I would turn him loose, come in and he will tell what he has to say. But he never said he did anything wrong. I told Mr. Feinberg that. He could not have been advised when he came down to his office and he said, "I didn't do anything wrong."

The man has never once in the confines of my office, by telephone, by letter, by rather intense interrogation on my part, admitted he did anything wrong, other than

what we pleaded to that day, that limited plea, which has to do with count 9.

You know, perhaps in connection with the recollection that we all have here, I might say that I had a conversation with Mr. Feinberg when Mr. Feinberg said to me that if I was going to appeal count 9 on my theory, however ill-fortuned it may be or it may not be, that he would not consent to dismissal of the outstanding counts. Yet I have a copy of the minutes of plea wherein that agreement is set forth in haec verba and where not even someone who is a Talmudic scholar with hostile intentions could misinterpret.

THE COURT: We are not on any disagreement on that.

MR. ARKIN: No longer, I hope.

THE COURT: I never was in any disagreement on that point.

MR. ARKIN: Well, between Mr. Feinberg and myself there was for a brief period of time. No, I never said that my man had anything inculpatory to say. I never said he could help to convict Mr. Anderson or Mr. Sloan or poor Mr. Villani, who should not have been in the case, or anybody else. I said he would come down and he would talk to him, which he did. He came down at Mr. Feinberg's convenience. And I might say, in discussing whatever he did with my client

Mr. Feinberg certainly did not let on to him that he was being deceitful or less than cooperative. In fact, as I am informed by my client, Mr. Feinberg said that he was going to go to bat for him with his school district, where he now teaches.

Your Honor, these acts, such as they are, took place five years ago, over five years ago. They were at a particularly bad time on Wall Street. My client, who is certainly no high-powered pro, but somebody who was working in the area for several years before he became a very minor part of Orvis Brothers, took over an operation, that is, as a kind of a line officer, operations manager, in 1968. What he took over was a condition, not that he created, a condition whether it had been hypothecated securities, which is the only thing he pleaded to, which condition continued in Orvis. He did not create the situation of the hypothecation of fully paid-for securities. He certainly was there while it continued. In December 1969 --

THE COURT: What keeps on puzzling me is how he and you can say he did nothing wrong when he hypothecated fully-paid-for securities. Regardless of what the SEC says about that, that is larceny.

MR. ARKIN: Let me respond to that. Aside from the statutory problem which I have with the plea, which your Honor

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is aware of --

THE COURT: That may or may not be a perfectly valid statutory point, and I wish you luck on it on appeal.

MR. ARKIN: Yes. That is a technical point. That is a drafting of the statute.

THE COURT: But it is larceny at common law. How can you say he did nothing wrong?

MR. ARKIN: Why is it not larceny at common law? It is not larceny at common law, because when he came into th situation there already had been this kind of hypothecation.

THE COURT: Other people had been crooks before him. Other people committed larceny before him.

MR. ARKIN: If your Honor please, if this is crookery, then in 1969 the entire Wall Street area was guilty of the same kind of crookery and the same kind of larceny, because this was a common practice. If it were larceny, if it were larceny, why would there have not been some attempts to conceal this? You know, Mr. Eucker certainly made Haskins & Sells, whatever else there was, aware of what was going on. He did not hide the fact of hypothecation, he did not have that kind of intent in his mind.

I might also say that there never was an intent, getting to the old traditional common law larceny, there never was an intent to deprive the customer of his securities

in the sense that in Mr. Eucker's mind at all times there was a sufficient amount of securities in the box, that is, in the possession of Orvis Brothers, to make good to any customer who wanted his securities. In other words, there was no intent to permanently deprive the customer of his rights.

As I understand common law larceny, your Honor -- I am a bit rusty on it, since we don't have any more common law -- that you must have an intent to permanently deprive. That did not exist, not with this man. What he did was continue a business practice. To be sure, it was arguably in violation of a statute, which I say, in this case at least, was pleaded incorrectly, which is why I made the kind of plea we made, which is why we made the kind of allocution we did. But there was no intent in common law terms to permanently deprive anybody of their securities or of their moneys.

This man did whatever he did in a desperate effort to keep the firm from going down. They were unsuccessful, difficult years. He came into a situation, he did not invent it, he did not profit by it, it took place five years ago. His firm, his group, was made some kind of an example.

Since that time, what has he been? He has been a school teacher, a school teacher in high school, and supportin his family as best he is able, with his wife's help and $47 a week, his family. The man is very far from being the

sort of person for whom jail would serve any purpose.

Your Honor suggested before in his philosophical discussion with Mr. Cohn that sort of to vindicate the system. A brief comment. I will take back what I said about not commenting. I cannot resist. Which is that I think this is a different kind of case than if somebody hits somebody over the head in the street or puts a gun to his head, a biblical classical kind of crime.There is a lot of hue and cry about treating white collar criminals, so to speak, the same as people who do things, which are biblically prohibited.

I say that might be easy to mouth, but at many times and in many practices it is downright stupid. If your Honor please, I don't mean to suggest in the slightest that I have any doubts about your Honor's wisdom, but I doask for

THE COURT: If you don't, we are not in the same league, because I do. But go ahead.

MR. ARKIN: If your Honor please, I certainly don't. I have dealt with you enough not to have those doubts I have my own on occasion.

The point is that this is not the kind of crime which is biblically or classically condemned, the idea of a white collar criminal being treated differently. If you look at these individuals -- I don't want to comment on them, but take my own client: he is not somebody who has lost

nothing through this set of circumstances. He has suffered. I think people are entitled, as they go through life, to a certain number of credits, whether it be community service, whether it be a good family man, whether it be living 43 years and not having a blemish on your record, serving in the armed services, being a good citizen generally. Any number of things. People as they go through life build up certain credits. And whitecollar criminals, be they of whatever ethnic origin, are very apt in many cases to have built up these kinds of credits. Well, they are entitled to them. When they lose their fortunes, when they lose their positions, when they lose their licenses, when they are barred from being in the stock market, when they are held up to obloquy, when their home-town newspapers write stories which make desperate criminals out of them -- well, that is worse than when you are on the street selling junk and beating somebody over the head, because they don't suffer the same way.

This man has suffered a lot, and what he had by way of fortune is now gone. What he had by way of status in terms of his business is gone. He is now a school teacher. What he did was hardly larceny, in my view. In view of the way the thing was pleaded, it is probably not even a crime. And I say to put him in jail, take him away from his family and his $12,000 a year high school teaching job, would be too

much and too far for this case.

I believe Mr. Eucker has a few comments to address to the court, and I promise you he will be extremely brief.

THE COURT: Mr. Eucker?

DEFENDANT EUCKER: The only comment I had, Judge, I didn't know what Mr. Arkin was going to say, was that I was really taken aback when I received the copy Saturday of Mr. Feinberg's response to you. In essence, because he had told me in our conversation that he would write a letter to my school board, I had the fear of newspaper articles being seen by the Board of Education in my school district, and I was up for tenure --

THE COURT: Does the Board of Education know of this problem?

DEFENDANT EUCKER: I do not believe so. My supervisor at the high school does know.

That is all I wanted to say, that I was really taken aback by this.

THE COURT: Thank you.

MR. LONDIN: Your Honor, may I comment briefly before Mr. Feinberg starts?

THE COURT: Yes.

MR. LONDIN: Your Honor, I want to address myself briefly to this issue your Honor raises about larceny.

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That is never an implication of a dismissal of count.

MR. FEINBERG: Two other points, your Honor. Mr. Arkin is obviously going to take this matter up on appeal. I don't think he will be successful. The Court has expressed his view on that as well. But since Mr. Arkin is going to appeal that plea, the government now cannot in good conscience-

THE COURT: The government is bound by its commitment, isn't it?

MR. FEINBERG: And if the Court is going to bind the government to that commitment, in the alternative the government will consent to allow him to withdraw that plea.

THE COURT: No, unless he has not applied to withdraw it, it is perfectly clear that at the time the plea was taken the appeal was intended and he told us the day before he pleaded that he wanted to appeal and we discussed whether he could or not. I did not think he could. I thought he ought to, and then subsequently the Court of Appeals came down with a decision which made it quite clear that he could.

MR. ARKIN: I also said during the same day of the plea I was going to do it.

THE COURT: What?

MR. ARKIN: The same day of the plea, your Honor, I spelled it out on the record.

THE COURT: No.

MR. FEINBERG: The government made its record.

THE COURT: Perfectly clear that that was the intention.

MR. ARKIN: May I have just one brief thing. I neglected, when I got carried away, if your Honor please, to state that the probation report appears to characterize my client in Mr. Feinberg's words as an engineer as opposed to a mechanic; whereas Mr. Feinberg's unkind letter characterizes my client as a mechanic and not as an engineer. In other words, there was supposed to be two engineers and two mechanics in Mr. Feinberg's parlance. I don't know how accurate that description is, and I certainly don't wish to lend any credence to it by my mentioning it. However, if being a mechanic is somewhat better than being an engineer, I should like the benefit of that designation for my client to be carried through the probation report. Would your Honor be cognizant of that?

MR. LONDIN: Your Honor, there has been much talk about Anderson saying the heck with it. The government during the trial when it talked about Anderson as a lord high overseer had a tendency to lapse into hyperbole as it does now. Anderson never said the heck with it. He never told Kilduff, "Make fraudulent entries, violate rules, fool the SEC." To the extent that there were problems with the recordkeeping,

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said.

THE COURT: In the first place, I guess the defendants can rise. I am not drawing any distinction between the defendants on the ground of pleading or going to trial. That is not because of what was said or what was not said. But it seems to me a difference between a defendant who pleads and who thereby shows contrition should be rewarded for the contrition, as that is an element in the punishment. You both say, although pleading, you did nothing wrong except violate the particular crime that you pleaded guilty to. On the basis of the record it just does not seem to me that that can be the case.

I have heard what your lawyers said and what you have said and I read the report, the statements that you both made to the probation department. I have to recognize the fact that you may be right and I may be wrong. But it is my responsibility to come to a conclusion, and I must say, on the basis of the evidence as presented, I cannot come to the conclusion you were all not aware of the fact that a crime was committed.

As I told you, however -- this applies only to Mr. Sloan, because Mr. Eucker, although he did plead, is appealing, and I am satisfied that he has the right to appeal, although I was not so satisfied at the time he took the plea.

Ordinarily on a plea this would be no occasion for staying execution of sentence, because there is no appeal. However, for the reason I indicated at the outset, should the sentence of either or both of the others be reversed, I want to be in a position to deal with that situation without your already having served your sentence. I also am glad that this gives an opportunity not to impose the sentence in this critical time in your life. This is without in your case prejudice to at that time -- your time of sentence would come in the time for execution -- it is without prejudice to calling my attention to the facts of your personal life at that particular time.

Sentence imposed on Mr. Anderson is without prejudice to what I have said, that I am going to deal with Mr. Londin's motion on the power to impose a prison sentence at all. I am going to deal with that in a formal opinion, which I will publish. As I have told Mr. Londin, I will deal with that with an open mind when I write my opinion, and if I think I conclude I am wrong, I will say so.

MR. LONDIN: Thank you, your Honor.

THE COURT: So the sentence I impose on you is subject not only to the possibility that the Court of Appeals may conclude I was wrong, in any of the various ways that Mr. Londin has indicated -- there may be more you can think of

between now and then -- it is also subject to the possibility I may conclude I am wrong on this one subject.

On the question of stay, however, I have been advised that your testimony, the testimony of all of you, is wanted in various litigations, and that you have quite properly refused to testify until sentence should be complete.

I view the sentence as now complete, and if you don't agree with me, my only solution to that is to revoke the stay. I think, unless somebody gives me a cogent reason why any of you should not testify in any of the civil cases where your testimony is now being required on the ground the sentence is not complete, because there is still a stay, I just have to revoke the stay. And I would think also that would apply to whether or not an appeal was pending, because there are grounds for revoking a stay or not granting a stay pending appeal, where, for example, there is no reasonable ground of success on appeal. I would not do it on that ground. I think both appeals are obviously taken in good faith. But another ground is that a stay would create a danger to the community. That is why I say that I think if a defendant arbitrarily refuses to testify on the technical ground that the sentence is not complete, I would consider that was a danger to the community.

So the stay is conditioned, at least in the absence

of further argument, further cogent reason, upon the fact that there will be no attempt to raise the Fifth Amendment on the ground that the sentence has not been complete.

As I have told you, it is my conviction that a sentence must be imposed. If it is any comfort to you, I will say the sentence I intend to impose is less than what some of my colleagues have thought was necessary. I will impose a sentence on each of the defendants of one year and one day, and the reason for the additional day is that, as counsel will explain to you, it allows probation earlier. The stay of execution is granted until further notice of the Court.

Of course, both defendants are aware of their rights. Mr. Anderson, you are aware of your right to appeal?

DEFENDANT ANDERSON: Yes, sir.

THE COURT: I need not elaborate on that.

I would like to know how you justify Mr. Eucker's right to appeal as a poor person in light of his probation report? It seems to me he has enough money to pay for a lawyer.

MR. ARKIN: May I first, before I justify, have the counts outstanding dismissed?

THE COURT: The count outstanding is dismissed.

MR. ARKIN: Count 8 and 1 dismissed.

